

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:CR-00-278-01
	:	
v.	:	
	:	
CURTIS MCKEITHAN	:	

MEMORANDUM

Before the court is Curtis McKeithan's pro se motions for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). The Government has filed a response in opposition, McKeithan has filed a reply in opposition to the Government's response, supplemental authorities and a motion for appointment of counsel.

McKeithan's original offense level was 42 with a criminal history of III, giving him a guideline range of 360 months to life. His amended guideline range would be 40 with a criminal history of III, resulting in the same guideline range of 360 months to life. The amendment does not affect his sentence.

In his response to the Government's brief, McKeithan asserts that his base offense level for the amount of drugs should be calculated at 38. McKeithan's base offense level was properly calculated at 38 with a four-level enhancement that brought him to a level 42. Thus, with a two-level reduction pursuant to this amendment, his new offense level would be 40 as noted above.

In his supplemental authorities, McKeithan cites to *Spears v. United States*, ___ U.S. ___, 129 S. Ct. 840 (2009), which held that a district court had authority to replace the guideline's 100:1 quantity ratio for crack/powder cocaine offenses with its own 20:1 ratio based on its policy disagreement with the guidelines.

That case is not retroactive and McKeithan cannot amend his sentence on this issue or through Amendment 706 and 18 U.S.C. § 3582(c).

McKeithan has presented another argument – that his sentence was so disparate from his codefendant that it violated 18 U.S.C. § 3553(a). This should have been argued on direct appeal. A sentence can only be amended under Rule 35 of the Federal Rules of Criminal Procedure; upon review by the court of appeals – 18 U.S.C. § 3742 – or by Rule 36 of the Federal Rules of Criminal Procedure. None of these apply to McKeithan.

An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: August 31, 2009.

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